SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1905.

No. 85.

RUSSIAN-AMERICAN PACKING COMPANY

vs.

THE UNITED STATES.

No. 86.

ROYAL PACKING COMPANY

vs.

THE UNITED STATES.

STATEMENT.

These cases, in all respects similar, excepting as to the parties and the amounts involved, were originally brought before the Court of Claims upon petitions, each of which in substance averred:

1. That the claimant herein is a company which was duly incorporated under the laws of the State of California in the year 1889 for the purpose of carrying on the business of packing salmon on the island of Afognak, Territory of Alaska, and that as such corporation it was privileged to acquire and hold lands in said Territory.

2. That subsequent to such incorporation, and in the spring of 1889, claimant purchased and shipped to said island of Afognak materials for the erection of a cannery and buildings for the purpose of canning salmon, took possession of a site thereon containing one hundred and fifty-nine and fifty-two one-hundredths (159.52) acres, cleared the trees therefrom and erected such cannery and buildings, and that prior to that time no person or corporation had been in possession of such ground.

3. That at the date of the passage of the act of Congress of March 3, 1891 (26 Stats. at Large, 1100), entitled "An act to repeal the timber-culture laws and for other purposes," claimant was and had been continuously since 1889 in the sole and exclusive possession of said grounds, occupying and using the same as a site for its cannery, and had erected thereon buildings, machinery, boats, and lighters costing $50,000.

4. That on April 1, 1892, claimant made application to the United States marshal and *ex-officio* surveyor general of Alaska for the survey of said tract, under the provisions of said act of March 3, 1891, and in response to the notification of such officer deposited in the United States subtreasury at San Francisco the estimated cost of such survey, $433.80, and thereupon said marshal and *ex-officio* surveyor general caused a survey of said ground to be made, which he numbered thirty-one (31), approved the same March 15, 1893, and forwarded it to the Commissioner of the General Land Office.

5. That subsequently to said 3d day of March, 1891, and until December 24, 1892, claimant continued to occupy said tract of land and to carry on its canning business and to erect valuable improvements thereon.

6. That prior to the 24th day of December, 1892, the said ground so used and occupied by claimant had not been reserved by the United States for fish culture or any other purposes; had not been purchased, entered, or applied for by any other person or corporation than claimant, and was non-mineral in character.

7. That on December 24, 1892, the President of the United States issued a proclamation declaring the whole island of Afognak, including the site occupied and improved by claimant, reserved for the purpose of establishing United States fish-culture stations, and warning all persons to depart therefrom; that in July, 1893, the agent of the United States for the protection of salmon fisheries informed the agents of claimant on said island of such proclamation and ordered them to depart therefrom, and that in obedience to such order and proclamation claimant left the island and its property thereon and has not since returned thereto or used the same for the purposes of its business.

8. That on January 15, 1895, the Commissioner of the General Land Office refused to accept, disapproved, and rejected the said survey (No. 31) of the land occupied and used by claimant on said island of Afognak for reason that the land had been reserved for public purposes on December 24, 1892, as aforesaid.

9. That claimant has employed a watchman to guard and attend to its improvements and machinery on said island of Afognak since it was forced to leave the same, but that notwithstanding such care and effort to preserve said property it is now practically worthless, and is not worth more than one-fifth of its original cost, and that no part of such property could have been at any time sold or taken from such island to be used elsewhere.

10. That during the four years of claimant's occupation of said site on Afognak island—viz., 1889, 1890, 1891, and 1892—it built up a large business in the catching and canning of salmon, which business produced a profit of $102,000 during said period, and that such business was totally destroyed by reason of claimant being required to remove from said island by the President's proclamation aforesaid, and that such site was a very valuable one for the purposes of salmon canning.

11. That the total loss sustained by claimant by virtue of its being forced to remove from said island of Afognak under the President's said proclamation of December 24, 1892, amounted to $146,433.80, $100,000 of which was caused by the loss of the business of claimant on said island, $40,000 by the loss of its buildings and machinery thereon, $6,000 by the loss of its boats and lighters, and $433.80 having been paid by it for survey No. 31, above mentioned.

12. That claimant has never made application for the return of the money paid by it for said survey, and has never received from the United States or from any other government or person any money or compensation whatever for the amount so deposited for survey, for the loss of its property or for the injury to its business on Afognak island.

Before the Court of Claims the petitioners did not press the claim for damages on account of the loss of prospective business, but urged judgment for the moneys paid the United States and for the loss of the plants in question.

The Court of Claims, after finding certain facts (Record, pp. 4, 5, 6, and 7), concluded that when appellants took possession of the land on Afognak island they did so in trespass and not under the authority of the United States as expressed in the act of May 17, 1884 (23 Stats., 24); that whilst the subsequent act of March 3, 1891 (26 Stats., 1095–

1100), authorized the possession and purchase of not to exceed one hundred and sixty acres of land for purposes of trade and manufacture, no patent had issued to appellants, and the United States had the right prior to the issuance of patents to reserve the land for public purposes. Recovery of the value of the improvements was thus denied, but judgment was rendered for the amount of money received from appellants on account of the survey of the claims in question.

Assignments of Error.

I.

In holding that appellants entered upon this land in trespass, and not under the authority of the act of May 17, 1884.

II.

In holding that appellants, being in possession of the land when the act of March 3, 1891, was passed, and engaged in manufacture and trade, did not seasonably take all the steps necessary to secure the issuance of a patent.

III.

In holding that steps so taken by appellants did not legally and equitably bar the United States from reserving said land for any purpose.

IV.

In holding that appellants were not entitled to judgment for the value of the improvements on said land when reserved by the United States.

ARGUMENT.

The only question of law involved in this case is whether or not the United States is liable to the claimant for the loss of its improvements placed upon the public lands in Alaska under a claim of occupancy, and the loss of its business carried on upon such lands caused by the act of the executive branch of the Government in withdrawing same from disposition and reserving them for public purposes.

We contend that the Government is so liable, both upon general principles of law and also by virtue of the act of Congress approved May 17, 1884 (23 Stats., 24).

As shown by the uncontroverted evidence introduced by the claimant, the Russian American Packing Company entered upon Afognak island in the year 1889 and erected many and valuable improvements thereon, relying upon its right of possession and its belief that Congress would by future legislation provide a means whereby it and other claimants to public lands in Alaska could obtain title thereto. Congress did enact such legislation by the act of March 3, 1891 (26 Stats., 1095), which act reads as follows:

> "SEC. 12. That any citizen of the United States "twenty-one years of age, and any association of such "citizens, and any incorporation incorporated under "the laws of the United States or of any State or "Territory in the United States now authorized by "law to hold lands in the Territories *now or hereafter* "*in the possession of and occupying public lands in* "*Alaska* for the purpose of trade or manufactures, *may* "*purchase* not exceeding one hundred and sixty acres, "to be taken as near as practicable in a square form, "of such land at two dollars and fifty cents per acre: "*Provided*, That in case more than one person, asso- "ciation or corporation shall claim the same tract of "land the person, association or corporation having "the prior claim by reason of possession and contin- "ued occupation shall be entitled to purchase the

"same; but the entry of no person, association or "corporation shall include improvements made by "or in possession of another prior to the passage of "this act.

"SEC. 13. That it shall be the duty of any person, "association or corporation entitled to purchase land "under this act to make an application to the United "States marshal, *ex-officio* surveyor general of Alaska, "for an estimate of the cost of making a survey of the "lands occupied by such person, association or cor- "poration, and the cost of the clerical work necessary "to be done in the office of the said United States "marshal, *ex-officio* surveyor general; and on the re- "ceipt of such estimate from the United States mar- "shal, *ex-officio* surveyor general, the said person, "association or corporation shall deposit the amount "in the United States depository, as is required by "section numbered 2401, Revised Statutes, relating to "deposits for surveys.

"That on the receipt by the United States marshal, "*ex-officio* surveyor general, of the said certificates of "deposit, he shall employ a competent person to make "such survey, under such rules and regulations as "may be adopted by the Secretary of the Interior, "who shall make his return of his field-notes and "maps to the office of the said United States marshal, "*ex-officio* surveyor general; and the said United "States marshal, *ex-officio* surveyor general, shall cause "the said field-notes and plats of such survey to be "examined, *and if correct approve the same*, and shall "transmit certified copies of such maps and plats to "the office of the Commissioner of the General Land "Office.

"That when the said notes and plats of said survey "*shall have been approved by the said Commissioner of* "*the General Land Office*, he shall notify such person, "association or corporation, who shall then, within "six months after such notice, pay to the said United "States marshal, *ex-officio* surveyor general, for such "land, *and p atent shall issue for the same.*"

At an early date after the passage of this act claimant herein took the necessary preliminary steps to perfect its title by applying for and having executed a survey of the lands claimed and occupied by it, after paying to a Government depository the full cost thereof. After the execution of such survey, but before the same was approved by the surveyor general of Alaska and forwarded to the General Land Office, the land was withdrawn from disposition by executive proclamation, and thereupon and thereunder claimant was compelled to leave the land by the officers of the Government, and was prevented from applying to purchase the same and making entry thereof under the trade and manufactures clause of the act of 1891, *supra*. It thus appears that claimant had done everything possible to protect its interests, and that its failure in such efforts and its losses consequent upon the above-mentioned executive action were not caused or affected by its own act, laches, or neglect.

It follows, therefore, that claimant has sustained the damages set up in its petition solely because of the act of the Government in withdrawing from sale and entry lands occupied and claimed by it for several years, and to which it had taken all possible steps to acquire title. That the Government is liable, upon the grounds of conscience and good faith, to make compensation for the damages so caused by it to an innocent party acting in good faith in the prosecution of a claim to public land cannot be doubted. That the Government is so liable upon strict legal grounds as well we also maintain.

We are well aware of the decision in the Yosemite Valley case (15 Wall., 77), which holds that—

> "a party by mere settlement upon lands of the
> "United States, with a declared intention to obtain a
> "title to the same under the pre-emption laws, does
> "not thereby acquire such a vested interest in the
> "premises as to deprive Congress of the power to
> "divest it by a grant to another party."

But we call attention to the fact that in the case at bar there has been something more than mere settlement upon the public lands; that claimant here has erected many and valuable improvements in reliance upon its title and the good faith of the Government; that it has taken every possible step to perfect such title and actually paid to the United States the amount necessary to pay the cost of the proceeding preliminary to making final entry, and would have made such final entry prior to the executive proclamation of December 24, 1892, had the survey been completed and approved within a reasonable time after the application therefor had been filed and the fees thereon paid by claimant. The case of the claimant herein, therefore, comes less within the doctrine of the Yosemite Valley case, *supra*, than within the rule laid down in the case of Lytle *vs.* State of Arkansas (9 Howard, 333), to wit:

> "It is a well-established principle, that when an "individual, in the prosecution of a right, does every- "thing which the law requires him to do, and he "fails to attain his right by the misconduct or neglect "of a public officer, the law will protect him. In "this case the pre-emptive right of Cloyes having "been proved, and an offer to pay the money for the "land claimed by him, under the act of 1830, nothing "more could be done by him, and nothing more could "be required of him under that act. And subse- "quently, when he paid the money to the receiver, "under subsequent acts, the surveys being returned, "he could do nothing more than offer to enter the "land, which the register would not permit him to "do. This claim of pre-emption stands before us in "a light not less favorable than it would have stood "if Cloyes or his representatives had been permitted "by the land officers to do what, in this respect, was "offered to be done."

Not only upon principles of right and justice is the United States liable for the losses occasioned to plaintiff by the reservation of the lands claimed by it in Alaska, but also by

reason of a statutory enactment. The proviso to section 8 of the act of May 17, 1884, aforesaid, providing a government for the district of Alaska, declared—

> "That the Indians or other persons in said district "shall not be disturbed in the possession of any lands "actually in their use or occupation or now claimed "by them, but the terms under which such persons "shall acquire title to such lands is reserved for future "legislation by Congress."

This declaration was a solemn assurance by Congress that the persons in possession of the public lands of Alaska should be permitted to acquire title thereto without being disturbed in their possession. It was in the nature of a statutory contract whereby the United States obligated itself to protect the settlers of Alaska and confer upon them title to the lands occupied by them without the danger of any interference or molestations by others, even the United States itself.

In Young *vs.* Goldsteen (97 Fed. Rep., 303) the district court of Alaska considered this legislation and held:

> "In our opinion, the language used is susceptible "of but one construction; *i. e.*, that Congress guaran- "teed to all persons in possession of lands in Alaska "at that date the right ultimately to acquire a perfect "title to the same. *If anything less was intended, then "the act was wholly meaningless. If Congress meant only "to guarantee to them undisturbed possession for the time "being, reserving the right to ultimately pass such laws as "would confiscate the property to the Government*, or give "it to another *then the act is worse than a mockery.* If "the expression 'the terms under which such persons "'may acquire title' means anything, it means that "at some future date the Congress will pass the need- "ful legislation whereby their possession will ripen "into perfect ownership. And until such legislation is "enacted the 'future legislation' is yet to be achieved. "*It is not too broad a construction of the language used to "apply it to those who, in good faith, were the first to take "up, occupy, and improve the public lands since that "date.* With the absolute guaranty of possession to

"those in possession of lands prior to May 17, 1884, "and with the laws relating to mineral lands only "having been extended to Alaska, *all persons* had a "right to expect protection from Congress if they "were the first in point of time to go upon the public "domain, and occupy and improve the same, *even "though they went there after May 17, 1884.*"

So, also, in the case at bar, if Congress induced the claimant to enter upon, occupy, and erect valuable improvements on the public domain, and to expend sums of money in attempting to gain title thereto, only to confiscate to the Government the land so occupied and improved, then the provision in the act of 1884 above quoted was a hollow mockery, and might better have been omitted from the statute books. If, however, Congress by such provision extended a standing invitation to all citizens of the United States to enter upon and develop the vast and theretofore unexploited resources of Alaska, and guaranteed for their enterprise and labors a certain title to the lands exploited, then the act is given a meaning which it would otherwise wholly lack. This is the construction which the court has given to the statute in the above-cited case, and this, we maintain, is the correct construction. In support of this view it is but necessary to cite the "future legislation" mentioned by said proviso, viz., the act of March 3, 1891 (26 Stats., 1095), which provides by section 12 for the purchase by any citizen or association or corporation of the United States "now or hereafter in possession of and oc- "cupying public lands in Alaska *for the purpose of trade or "manufactures*"—a provision without precedent in the history of the public land law of the United States. It will be seen that the act of 1891 not only thus provided for those in possession of Alaska lands *prior* to May 17, 1884, but also to those *thereafter* in possession, and it may be gathered from this fact that the act of 1884 was also intended to embrace both such classes of persons within its provisions.

We therefore contend that the act of May 17, 1884, amounted to a contract between the United States, on the one side, and those who had then or might thereafter settle upon public lands in Alaska, upon the other. The United States was obligated to perform such contract, or if it broke the same to pay damages for the breach. When an American citizen relying upon such solemn assurances of protection, and performing upon his part all the acts necessary to bring himself within that protection, and to secure the title guaranteed by the act of Congress, has put himself in such a position that the Government's breach of its contract will change his status for the worse, it is the bounden legal, as well as moral, duty of the Government to indemnify him for his losses. Such is the case of appellant, and such is the duty of the Government in relation to it.

This contractual obligation of the Government under the act of 1884 was in many respects similar to its obligations under an Indian treaty, which have always been enforced against it by the courts. Thus in the case of United States *vs.* Carpenter (111 U. S., 347) this court held land scrip located upon lands reserved for Indians under the provisions of a treaty with an Indian tribe, and the issue of a patent therefor, are void, and that "this purpose and the stipula-"tion of the United States could not be defeated by the ac-"tion of any officers of the Land Department." This ruling was affirmed in the case of Spalding *vs.* Chandler (160 U. S., 394), wherein was held to be of no effect a presidential proclamation reserving for public purposes a tract of land which the Government had stipulated by treaty to reserve for the benefit of an Indian tribe—a case "on all fours" with the one at bar.

It will furthermore be observed that the act of May 17, 1884, *supra*, provided that "the terms under which such per-"sons (*i. e.*, occupants) shall acquire title to such lands is "reserved for *future legislation by Congress*"—*not* for future presidential proclamation or executive orders. Congress

never delegated to the President its power to reserve lands from settlement and occupation for fishery or other purposes (so far as counsel can ascertain by a diligent search through the volumes of the Statutes at Large) until after claimant had erected valuable improvements upon the lands occupied by it. Therefore claimant is entitled to the full protection of the guaranty extended by the act of 1884 aforesaid, and the case falls within the rule laid down by Judge Deady in The United States *vs.* Tichenor (8 Saw., 142, 152), viz:

> "So soon as Tichenor became a settler on the land "under the donation act *there was no longer any power* "*in the President to appropriate it for any purpose.* "It had, thereupon, become private property, and "could only be taken for public uses by the authority "of Congress, acting under the right of eminent "domain, *and upon making just compensation therefor* "(5th amend. U. S. Const.)."

It is true that the Oregon donation act of 1850, mentioned in the decision cited, is not identical with the Alaska act of 1884, but with respect to the power of the executive branch of the National Government to intrench upon and nullify their provisions they must be construed alike. Moreover, section 7 of the said act of 1884 (23 Stats., 27, 28) extended the general laws of Oregon over the district of Alaska, so far as the same were applicable and not in conflict with the provisions of that act or the laws of the United States; so that the same interpretation of similar laws would seem to be not only proper, but requisite.

Proceeding within a reasonable time in strict accord with these provisions of law, this company applied for the survey of its claims, paid the necessary costs of survey, and upon the approval of same by the surveyor general deposited the price of the land. Absolutely nothing further remained for it to do. It had made a valid location; had constructed its plant; had surveyed its claim, paid the price, and de-

pended upon the United States to issue its patent. These circumstances clearly bring the case within the principles laid down in Lytle *vs.* Arkansas, 9 How., 314.

Counsel for the United States contends that no vested right had attached, because the Commissioner had not approved the survey, but had rejected it. But why did he reject it? Not because the claim was illegal and not fully within the law. No; but simply because the President had issued an order reserving the land for fishery purposes. It was not because of any act of commission or omission upon the part of the claimant, and its rights had vested just as much as though the survey had been approved, if, as we contend, it had done everything in its power as required by law to entitle it to such approval.

The Yosemite case is no guide here. That was a case of a mere pre-emption declaratory statement of a man's intention to do something which he might never do. The law gave him no interest in the land and his filing offered him no protection. He was not by the filing itself even in the class of actual settlers.

The claimant in this case falls in that larger and more easily recognized class of claimants with something tangible. A homesteader who makes original entry, settles upon land, and improves it, cannot be disturbed under the Yosemite doctrine. Why? Because he has something tangible, and because the act of Congress under which he claims is a contract as well as a law, guaranteeing him a patent upon a fulfillment by him of its requirements.

All acts of Congress providing means of disposing of its vacant public lands are in the nature of contracts, obligating the United States to grant the individual a patent conferring the title upon him, whenever he has complied with the provisions of law in that particular case. Whenever the individual, in good faith, initiates a claim by settlement, occupation, and improvements, he thereby acquires an inchoate right, which must ripen in a perfect title, whenever he has completed his period of residence, amount of cultivation, or

other specific requirement of the law. Neither the United States nor any third party can defeat his right to acquire this title, excepting through his own failure to meet the requirements of the law. The act of 1891, providing for the entry of lands in Alaska for trade and manufacturing purposes, is closely akin to previous acts of Congress providing for the location of New Madrid certificates in Missouri, and the confirmation of donation claims in Washington and Oregon. The validity of such claims has been the subject of numerous decisions in the courts, and all of them, so far as our knowledge extends, have been to the effect of holding that by the actual use and occupation of the land, and a compliance with the requirements of the law, the parties have initiated such an inchoate claim of title that will compel the issuance of a patent by the Government, or, if patent is erroneously issued to some third party, a decree by a court of competent jurisdiction that such title is held in trust for the donation claimant.

In *Stark vs. Starr*, 6 Wall., 415, the Oregon donation act was under consideration, and after a full recital of the facts and a reference to the conflicting townsite, as such was held to validate the donation claim, the court says (p. 417):

> "Before the passage of this act the claim of the defendant, Stark, had been surveyed, and the required proof of his settlement and continued occupation and residence made, and such steps had been taken as to perfect his right to a patent. The lands embraced by his claim had then ceased to be the subject of purchase from the United States, by any persons, natural or artificial. The right to a patent once vested is treated by the Government when dealing with the public lands as equivalent to a patent issued. When, in fact, the patent does issue, it relates back to the inception of the right of the patentee, so far as it may be necessary, to cut off intervening claimants."

See also—

Garland vs. Wynne, 20 How., 6.

Lindsay vs. Hawks, 2 Black, 554.

The doctrine of relation referred to in this case is quite old with respect to disposition of the public lands, and is more specifically referred to in *Landes vs. Brandt*, 10 How., 348, 372, as follows:

> "The rule applies 'that where there are divers acts
> "'concurrent to make a conveyance, estate or other
> "'thing, the original act shall be preferred, and to
> "'this the other act shall have relation' as stated in
> "Viner's Abr., tit. Relation, 290. The doctrine of
> "relation is well illustrated in Jackson *vs.* Ramsey by
> "the supreme court of New York, 3 Cowan, 75, and
> "recognized by the supreme court of Missouri in the
> "case of *Crowley vs. Wallace*, 12 Mo., 145. Cruise on
> "Real Property, vol. 5, pp. 510, 511, lays down the
> "doctrine with great distinctness. He says, 'There
> "'is no rule better founded in law, reason and con-
> "'venience than this—that all the several parts and
> "'ceremonies necessary to complete a conveyance
> "'shall be taken together as one act and operate from
> "'the substantial part by relation.' * * * Apply-
> "ing the doctrine of relation and taking all the several
> "parts and ceremonies necessary to complete the title
> "together as one act, then the confirmation of 1811
> "and the patent of 1845 must be taken to relate to
> "the first act: *that of filing the claim in 1805.*"

So also in *Gibson vs. Choteau*, 13 Wall., 92, 100, the rule was applied thus:

> "By the doctrine of relation is meant that principle
> "by which an act done at one time is considered by
> "a fiction of law to have been done at some antece-
> "dent period. It is usually applied where several
> "proceedings are essential to complete a particular
> "transaction, such as a conveyance or deed. The
> "last proceeding which consummates the conveyance
> "is held for certain purposes to take effect by relation
> "as of the day when the first proceeding was had.
> "Thus in the present case, the patent, which was
> "issued in 1862 is said to take effect by relation at
> "the time when the survey and plat of the location,
> "made in 1818, were returned to the recorder of land

"titles under the act of Congress. At that time the
"title of the claimant to the land desired by him had
"its inception, and so far as it is necessary to protect
"his rights to the land, and the rights of parties de-
"riving their interests from him, the patent is held
"to take effect by relation as of that date."

This doctrine of relation applies fully to all proceedings before the Land Department looking to the acquisition of title under the various public land laws. None of them in and of themselves transfer the legal title of any lands from the Government to the individual. All of them require something from the individual claimant, either in the way of a location, identifying the land granted a claimant; occupation, indicating the *bona fide* purpose of the claimant to establish a home; the actual selection by a State or railroad company to identify the tract enuring to it under its grant, or, in the case now under consideration, the establishment of a manufacturing plant, and the proper survey of the land embracing the same. All these acts constitute the chain of evidence leading up to the issuance of a patent divesting the United States of legal title, and in all of such cases, from the beginning of the initial act, the individual claimant acquires a right to the land selected or located which confers upon him immunity from invasion or interference by the United States or any third party, so as to prevent his further compliance with the law and the ultimate acquisition of the fee-simple title. In speaking of a railroad indemnity selection, this court in *Michigan Land and Iron Company vs. Rust*, 168 U. S., 589, 592, said:

"Generally speaking, while the legal title remains
"in the United States the grant is in process of ad-
"ministration and the land is subject to the jurisdic-
"tion of the Land Department of the Government.
"It is true a patent is not always necessary for the
"transfer of the legal title. Sometimes an act of Con-
"gress will pass the fee. * * * Sometimes a cer-
"tification of a list of lands to the grantee is declared

"to be operative to transfer such title, but whenever "the granting act specifically provides for the issue of "patent, then the rule is that the legal title remains "in the Government until the issue of the patent, and "while so remaining the grant is in process of ad- "ministration and the jurisdiction of the Land De- "partment is not lost. *It is of course, not pretended, "that when an equitable title has passed, the Land Depart- "ment has power to arbitrarily destroy that equitable "title.*"

Following this same line of thought the Secretary of the Interior, in Hastings and Dakota Ry. Co., 18 L. D., 511, 518, held:

"It is true that while the title to the lands within "the primary limits passed to the company upon the "definite location of the line of road, the title to the "indemnity lands does not pass and is not vested in "the beneficiary until a selection is made, and that "selection is approved by the Secretary of the Interior "(Wis. *vs.* Price Co., 133 U. S., 496). But the vesting "of the title to particular lands is entirely different "from the 'right' to initiate proceedings which will "ultimately ripen by approval into a perfect and com- "plete title. This 'right to select' is recognized in "the Kansas Pacific case, 112 U. S., 421, and other "decisions of that court, as well as in many decisions "of this Department; and in the Cedar Rapids case, "110 U. S., 39, it is said that this 'right' accrues when "the map of the entire line is filed, that is, the lands "in place being then capable of identification, and "the lost lands ascertainable, coincidently therewith "the 'right' to select arises and becomes fixed in the "grantee company, though the title to the selected "lands do not vest until after approval, if there be "any to select. Unquestionably it is a 'right,' and a "valuable property right, such a right as might be "sold or encumbered (Myers *vs.* Croft, 13 Wall., 291) "as has been frequently done by grantee companies, "and would entitle the assignees to the indemnity "lands when title thereto is perfected under the grant, "in accordance with its directions. Such a right is, to

" my mind, as a *chose in action*, part of the *assets* of the " corporation in question, and would be administered " by a court of equity in the interest of the creditors " and stockholders, the court appointing a trustee, if " necessary, to secure possession and control of these " assets."

See also Hagen *vs.* Northern Pacific, 26 L. D., 312.

All of these authorities and many others referred to in the decisions cited are to the effect that when a claimant initiates a *bona fide* claim to vacant public land of the United States he thereby acquires a right to perfect his title under the law and regulations, and that, upon a full compliance by him with such law and regulations, he acquires a vested interest entitling him to the issuance of a patent, and that being entitled to a patent, it is the same in the eye of the law as though patent had actually issued.

" When a tract of land shall have once been legally " appropriated for any purpose, from that moment the " land thus appropriated becomes severed from the " mass of public land, and no subsequent law or " proclamation or sale would be construed to embrace " it or operate upon it, although no reservation were " made of it."

Wilcox *vs.* Jackson, 13 Pet., 498–513.
L. L. & G. *vs.* U. S., 92 U. S., 733.
Newhall *vs.* Sanger, 92 U. S., 761–'3.

It would be just as reasonable to hold that a patent alone can confer rights as to allow the claim of the Government in this case. Aside from the pre-emption law dealt with in the Yosemite case, every act of Congress providing for the issuance of patents to claimants of its vacant lands guarantees those claimants a patent upon compliance with the law, and the laws would be a farce if, after such compliance, the United States could, through its Executive, withdraw the land from rights which had already attached. Even mere

settlement without entry is protected under all late legislation such as forest-reservation acts, etc.

Cornelius *vs.* Kessel, 128 U. S., 456–461, held:

> "The power of supervision and correction is not "an unlimited or an arbitrary power. It can be exerted only when the entry was made upon false testimony or without authority of law. It cannot be "exercised so as to deprive any person of land lawfully entered and paid for. By such entry and payment the purchaser secures a vested interest in the "property and the right to a patent therefor, and can "no more be deprived of it by order of the Commissioner than he can be deprived by such order "of any other lawfully acquired property. Any attempted deprivation in that way of such interest "will be corrected whenever the matter is presented "so the judiciary can act upon it."
>
> See also Brown *vs.* Hitchcock, 173 U. S., 478.

It is contrary to the most elementary principles of public-land law to say that patent alone can divest the United States of the power of disposing of land, and it is equally erroneous to say that no reciprocal obligation exists unless the United States can force the individual claimant to complete his claim by actual payment for the land. Every act of Congress authorizing settlement upon or entry of its vacant public lands holds out the obligation of the Government to grant the patent. The actual settlement, the occupation and improvement of the land, are the material factors, and rights are thereby acquired which the United States cannot and will not repudiate.

In *Osborn vs. United States*, 33 Court of Claims, 304, 306, after referring to the various acts of Congress providing for the disposing of its vacant lands, the court holds:

> "This act authorizes and invites the pre-emption of "*all lands* belonging to the public domain to which "the Indian title has been extinguished, whether surveyed or unsurveyed. And when a party has oc-

"cupied and improved unsurveyed public lands he
"has the right, under said act, of exercising the priv-
"ilege of claiming said land by pre-emption for the
"period of six months after it shall have been sur-
"veyed. This act does not make it unlawful, or a
"trespass, to occupy and improve such unsurveyed
"land, but authorizes such occupancy and improve-
"ment, and upon the occupant doing this he is of-
"fered the privilege not only of permanently retain-
"ing the possession of said land, but of acquiring an
"absolute title to the land itself upon paying a small
"nominal consideration therefor."

This, however, is an academic question so far as this case is concerned, because the testimony shows a complete compliance with the terms of the act of March 3, 1891, down to and including the purchase price of the land.

The general circular issued by the Department of the Interior June 3, 1891, promulgating regulations under the act of March 3, 1891, on page 3 provides:

"If, upon examination, the application shall be ap-
"proved by the *ex-officio* surveyor general, he will
"furnish the applicants two separate estimates,
"one for the field work, and one for the office work,
"the latter to include clerk hire and the necessary
"stationery. The surveyor general will be careful
"to estimate adequate sums in order to avoid the
"necessity for additional deposits."

"Upon receiving such estimates, applicants may de-
"posit in a proper U. S. depository, to the credit of
"the Treasurer of the United States, on account of
"surveying the public lands in Alaska, and expenses
"incident thereto, the sums so estimated as the total
"cost of the survey including field and office work."

* * * * * * *

"The triplicate certificate of deposit will be receiv-
"able in payment to the extent of the amount of such
"certificate, for the land purchased, the surveying of
"which is paid for out of such deposit, as provided in
"section 2403 of the Revised Statutes."

The deposit thus made, being in excess of the purchase price of the land, was a complete compliance by the claimant with each and every requirement of the law, and brings it well within the decisions cited *supra*.

For these reasons we respectfully submit that this company, having met the requirement of the law, was legally entitled to a fulfillment by the United States of its agreement, and just so far as the reservation of the land has prevented such contract from being fulfilled, so far the United States is liable and should pay.

Respectfully submitted.

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